COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 000154-03**

Kathryn Markos-Waiswilos	Employee
Salem Hospital	Employer
Salem Hospital	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Horan)

APPEARANCES
Andrew S. A. Levine, Esq., for the self-insurer
Michael D. Ververis, Esq., for the Workers' Compensation Trust Fund

McCARTHY, J. The self-insurer appeals from an administrative judge's decision denying its petition for reimbursement from the Workers' Compensation Trust Fund (Trust Fund), pursuant to G. L. c. 152, § 37, for certain benefits it paid to the employee. The self-insurer argues that its entitlement to reimbursement under § 37 vested on the date of injury, August 17, 1991, which was four months prior to the December 23, 1991 effective date of the amendment to § 65(2) allowing self-insurers to "opt-out" of the Trust Fund assessment/reimbursement system, and ten months before the self-insurer elected to opt out on July 1, 1992. It maintains that the opt-out provision should apply prospectively, only to dates of injury after its election to opt out of participation in the Trust Fund. For the reasons enunciated in Richards v. Dupont de Nemours & Co., Inc., 16 Mass. Workers' Comp. Rep. 83 (2002), *aff'd* Mass. App. Ct., No. 02-J-165 (January 28, 2005)(single justice), we affirm the administrative judge's decision.

General Laws c. 152, § 37, allows an insurer to petition the Trust Fund for reimbursement of up to 75% of certain benefits paid after the first 104 weeks of disability, where an employee with a known physical impairment suffers a compensable injury resulting in a "disability that is substantially greater by reason of the combined effects of such impairment and subsequent personal injury than that disability which

would have resulted from the subsequent personal injury alone." Section 37 further provides that the insurer shall be reimbursed by the Trust Fund unless it "has chosen not to be subject to the assessments which fund said reimbursements." Section 65(2), which establishes the Trust Fund, states that it shall reimburse, inter alia, "certain apportioned benefits pursuant to section thirty-seven." § 65(2)(c). However,

> No reimbursements from the . . . Trust Fund shall be made . . . to any . . . self-insurer . . . which has chosen not to participate in the fund as hereinafter provided.
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> . . .
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> No private employer with a license to self-insure and no private self-insurance group shall be required to pay assessments levied to pay for disbursements under clauses (a) to (g), inclusive . . . if such employer or group has given up an entitlement to reimbursement under said clauses by filing a notice of non-participation with the department.

G. L. c. 152, § 65(2), as amended by St. 1991, c. 398, § 85, effective December 23, 1991.

Prior to the effective date of this section, insurers did not have the option of non-participation in the Trust Fund. (Dec. 5.) The issue here is whether the self-insurer, by voluntarily opting out of participation in the § 65(2) assessment/reimbursement scheme on July 1, 1992, gave up its right to reimbursement from the Trust Fund for benefits paid for all dates of injury, or only for dates of injury after July 1, 1992. We hold that the self-insurer has given up its right to reimbursement for all dates of injury.

The stipulated facts underlying this question of statutory construction are as follow. While working for the employer prior to her industrial injury, the employee, a nurse, had a "known physical impairment" involving her lower back, within the meaning of § 37. On August 17, 1991, she sustained a work injury to her back resulting in a disability that, due to her pre-existing known physical impairment, was substantially greater than the disability that would have resulted from the industrial accident alone. (Dec. 3.) The self-insurer elected not to participate in the § 65(2) trust fund, effective July 1, 1992. (Dec. 2.) On or about January 22, 2003, the self-insurer petitioned the

Trust Fund for reimbursement in accordance with § 37.[1] The Trust Fund denied the petition. (Dec. 3.)

At a § 10A conference, the judge denied the self-insurer's claim for reimbursement, and the self-insurer appealed to a hearing de novo.[2] Id. In his hearing decision, the judge again denied the reimbursement claim, relying on our holding in Richards, supra. The judge reasoned that the opt-out provision of § 65(2) was procedural rather than substantive, within the meaning of G. L. c. 152, § 2A, because it did not increase or decrease the amount of compensation payable to an injured employee, and was therefore applicable regardless of the date of injury. (Dec. 5.) The judge further held that the December 23, 1991 amendment to § 65(2) was clear that the insurer had the right not to participate in, i.e. not pay assessments to, the Trust Fund, and it was also clear that the consequence of non-participation was loss of entitlement to § 37 reimbursement. (Dec. 5.) Thus, the judge denied the self-insurer's claim. (Dec. 6.)

On appeal, the self-insurer maintains that the language of § 65 is ambiguous and, thus, we should look to the purposes of § 37 and § 65, which, it claims, are best effectuated by viewing the "opt-out" provision as operating prospectively to dates of injury after it elects not to participate in the Trust Fund. (Self-insurer br. 7-8.) The self-insurer further argues that our holding in Richards, supra, is inapposite because there, the employee's injury was after the effective date of the amendment to § 37 adding the opt-out provision, whereas here, the employee's injury was prior to the effective date of that amendment. Finally, the self-insurer argues that Richards was wrongly decided.

In Richards, supra, we held that it was unnecessary to look to the purpose and intent of the legislature in enacting the opt-out provision of § 65(2) because the relevant

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[1] The stipulations as recited by the judge did not state when or what benefits were paid, but the briefs of the parties indicate that the employee received periods of § 34 and § 35 weekly benefits, and that the case was resolved by way of a lump sum settlement on or about November 14, 1995. (Trust Fund br. 5; Self-ins. br. 2.)

[2] At hearing, the parties reserved a number of issues, including whether the self-insurer satisfied all the elements of § 37, claimed thereunder, and whether the statute of limitations barred the self-insurer's claim.

language was clear and unambiguous: "We read the words, 'No reimbursements . . . shall be made,' to mean what they say. Upon electing non-participation, the self-insurer receives 'no reimbursements,' not just no reimbursement for dates of injury yet to occur." Id. at 85-86. As was also pointed out in Richards, the amendment to § 65(2) adding the right to opt-out did not extinguish or impair the self-insurer's rights to reimbursement for dates of injury prior to opting out, since opting out of participation in the Trust Fund is an *election* by the self-insurer. Supra at 87.

We also addressed the retroactive application of § 65(2):

> Even if we were to read "no reimbursements" as ambiguous, as the self-insurer argues, the legislature's characterization of the amendment adding the opt out provisions as procedural renders the amendment applicable to "personal injuries irrespective of the date of their occurrence" under § 2A, St. 1991, c. 398, § 107 and would lead us to the same result. Although the date of injury at issue in this case is after the enactment of the amendment on December 23, 1991, we read the procedural characterization as necessarily implying that, upon electing to opt out, "[n]o reimbursements from the Workers' Compensation Trust Fund shall be made" to the self-insurer for all "personal injuries irrespective of the date of their occurrence." § 65(2) and § 2A supra, emphasis added.

Richards, supra at 86. A single justice of the Appeals Court affirmed the reviewing board decision. Richards v. Dupont de Nemours & Co., Inc., Mass. App. Ct., No. 02-J-165 (January 28, 2005).

Though the above-quoted analysis may not have been entirely necessary to the outcome in Richards,[3] we adopt it as a necessary part of our analysis in this case. Unlike Richards, this case does present a situation where we must determine whether the statute

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[3] In affirming our decision in Richards, supra, the single justice of the appeals court agreed with the concurring administrative law judge that "a substantive/procedural analysis attempting to justify the application of the 'no reimbursement' language to an injury incurred prior to the effective date of withdrawal adds little. There is no issue arising from an attempt to apply the 1991 statute retroactively. All of the relevant events in this case, including the employee's second injury, occurred after the effective date of the 1991 revisions." Richards v. Dupont de Nemours & Co., Inc., Mass. App. Ct. No. 02-J-165 (January 28, 2005)(single justice)(slip op. at 4 n.2). The fact that here the employee's so-called "second injury" occurred four months *prior to* the effective date of the 1991 amendment, makes such an analysis appropriate, but does not change the outcome in this case.

should be applied retroactively, since the date of injury (August 17, 1991) is prior to the effective date of § 65(2) (December 23, 1991). However, as stated in Richards, the Legislature clearly designated the 1991 amendment to § 65(2) as procedural, and thus applicable to all dates of injury. General Laws c. 152, § 2A, provides that amendments increasing or decreasing compensation payable to an injured employee shall be deemed substantive and applicable only to injuries occurring on or after the effective dates of such amendments, unless otherwise provided. All other amendments are deemed procedural and apply to injuries regardless of their date of occurrence. Section 107 of chapter 398 provides, except as specifically provided by sections 103 to 106, that all sections of the act shall be deemed to be procedural in character, for purposes of c. 152, § 2A . Section 65(2) was effected by section 85 of chapter 398. The Legislature did not designate § 85 as substantive in sections 103 through 106. Therefore, the plain language of § 107 indicates that the Legislature intended §65(2) to be a procedural provision, having "application to personal injuries irrespective of the date of their occurrence." G. L. c. 152, § 2A. See Connolly's Case, 418 Mass. 848, 850-851 (1994). See also Eastern Casualty Ins. Co., Inc., v. Roberts, 52 Mass. App. Ct. 619, 626 (2001)(regarding procedural nature of amendment to § 8(1) creating a statutory penalty).

Thus, the judge was correct that the self-insurer's decision to opt out of participation in the assessment/reimbursement scheme created by § 65(2), effective July 1, 1992, had retroactive application and thus extinguished the self-insurer's right to reimbursement pursuant to § 37 for benefits paid to the employee, who was injured prior to the effective date of the amendment.

The decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***August 9, 2005***

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge